

To	Tim Latas	From	Tayseer Mahmoud
Co./Dept.	Bechtel	Co.	DTSC
Phone #	619 687-8848	Phone #	310 590-4891
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CALIFORNIA DEPARTMENT OF TRANSPORTATION ID GAME

BRAC/IR TEAM
20 Lower Ragsdale Drive, Suite 100
Monterey, CA 93940

FAX COVER SHEET

CTO-076/0291

September 3, 1996

TO: MR. ROY YEAMAN, DTSC
cc: MR. TAYSEER MAHMOUD, DTSC

FAX NO: (310) 590-4932

FROM: Scott A. Flint
Phone: (916) 684-7977

TOTAL PAGES: 6

MESSAGE: Roy,

Here are DFG's potential ARARs for MCAS El Toro, OU-2B and OU-2C sites. I discovered that this letter was not faxed to you properly due to an error in the computer/fax system, I apologize for the delay.

Scott

State of California

MEMORANDUM

To: Mr. Roy Yeaman
Department of Toxic Substances Control
Office of Military Facilities
245 West Broadway, Suite 425
Long Beach, CA 92802-4444

Date: August 26, 1996

From: Department of Fish and Game

Subject: Location-Specific Applicable or Relevant and Appropriate Requirements (ARARs) Marine Corps Air Station El Toro (MCAS El Toro), Operable Units 2B and 2C.
(5920/60130/NTX502 00:20)

This is in response to your letter of August 7, 1996 to the Department of Fish and Game (DFG) requesting potential State location specific ARARs for the subject site. DFG appreciates your request for providing State laws and regulations to guide the planned Removal Actions at MCAS El Toro OU-2B and OU2-C

As the lead State agency for toxic cleanup, you are making an inquiry to the Department for purposes of coordination and definition of appropriate State cleanup requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as a portion of the site remediation process. This letter will also serve to advise you of the Department's interest in coordinating any natural resource issues as one of the designated State natural resource trustees, which may be necessary should the release(s) of any hazardous materials at the subject sites affect State natural resources, pursuant to CERCLA.

We have not had the opportunity to do an inspection of the sites. However, based upon information attached to your request, Department staff identified potential actions that could affect the following State fish and wildlife resources:

1. California gnatcatcher (*Poliopitula californica*) [Federally listed threatened, California Species of Special Concern (CSC)]
2. Coastal cactus wren (*Campylorhynchus brunneicapillus*) (CSC)
3. Orange throated whiptail (*Cnemidophorus hyperythrus*) (CSC)
4. Western spadefoot toad (*Scaphiopus hammondi*) (CSC)
5. Southwestern pond turtle (*Clemmys marmorata pallida*) (CSC)

Listed in the enclosed table are the Fish and Game Code sections that are possible State location-specific ARARs or "to be considered(s)" (TBCs) to ensure compliance with state law for the protection of these species and their habitats. The specific citation and explanation for each listed ARAR and TBC are included.

We have reviewed Enclosure 1, "Project Description and List of Remedial Alternatives" for the various OU-2B and OU-2C Sites in the attachment to your letter. The presumptive remedy for each site

Mr. Roy Yeaman

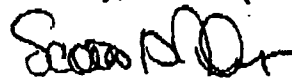
August 26, 1996

Page 2

includes landfill capping and installation/maintenance of other specific engineering controls. The removal actions will serve to protect State fish and wildlife resources by preventing exposure to chemical contaminants at each site. While this is true, mitigation will also be required for any impacts to the species and/or habitats which occur as a result of the landfill capping and related construction activities at each site. The Department of Toxic Substances Control and the Department of the Navy should consult with DFG to ensure that impacts and mitigation requirements are properly assessed. In addition, DFG should be included in the Agency review of the Draft Feasibility Study Documents, and DFG staff will be reviewing the site specific environmental information and ecological risk assessments that were completed in the earlier remedial investigation reports for these sites.

Thank you for the opportunity to comment upon the ARARs request. If you have any questions regarding these comments or need additional information, please call me at (408) 649-7195. The DFG BRAC/TR Team staff should be included in any future ARAR related activity or for consultation on wildlife/habitat issues at this site.

Sincerely,



Scott A. Flint
Senior Biologist
Environmental Services Division

Enclosure

SF:sf

cc: Department of Toxic Substances Control

Mr. Taysccr Mahmoud

Department of Fish and Game

Mr. Pete Phillips, Sacramento

Mr. John Turner, Sacramento

Ms. Jennifer Decker, Sacramento

**LOCATION SPECIFIC ARARs AND TBCs for MCAS EL TORO
OU-2B Sites 2, 17 and OU-2C Sites 3, 5**

LOCATION	STANDARD	SPECIFIC CITATION	MEANING EXPLANATION
Aquatic habitat/species	Action must be taken if toxic materials are placed where they can enter waters of the State. There can be no releases that would have a deleterious effect on species or habitat.	Fish & Game Code sections 5650 (a), (b) & (f)	<p>These code sections prohibit the deposition into State waters of, <i>inter alia</i>, petroleum products [Section 5650 (a)], factory refuse [Section 5650 (b)], and any substance deleterious to fish, plants or birds [Section 5650 (f)]. These are substantive promulgated environmental protection requirements. These requirements impose strict criminal liability on violators. (People v. Chevron Chemical Company (1983) 143 Cal App.3d 50.). This imposition of strict criminal liability imposes a standard that is more stringent than Federal law. The extent to which each subdivision of Section 5650 is relevant and appropriate depends on site specific conditions or details.</p> <p>There is also a scientific/technical reason for inclusion of Section 5650 as a potential location specific ARAR. State and Federal water quality control standards are generally developed, utilizing data, information, and guidance from numerous sources. Federal water quality criteria may allow higher concentrations of chemicals for limited time periods, which can result in conditions which are deleterious to State fish, plants, or birds.</p>
Wetlands	Actions must be taken to assure that there is "no net loss" of wetlands acreage or habitat value. Action must be taken to preserve, protect, restore and enhance California's wetland acreage and habitat values.	Fish and Game Commission Wetlands Policy (adopted 1987) included in Fish and Game Code Addenda	This policy seeks to provide for the protection, preservation, restoration, enhancement and expansion of wetland habitat in California. Further, it opposes any development or conversion of wetland which would result in a reduction of wetland acreage or habitat value. It adopts the USFWS definition of a wetland which utilizes hydric soils, saturation or inundation, and vegetable criteria, and requires the presence of at least one of these criteria (rather than all three) in order to classify an area as a wetland. This policy is not a regulatory program and should be included as a TBC.

LOCATION SPECIFIC ARARs AND TBCs for MCAS EL TORO
OU-2B Sites 2, 17 and OU-2C Sites 3, 5

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Endangered Species	Action must be taken to conserve endangered species, there can be no releases and/or actions that would have a deleterious effect on species or habitat.	Fish & Game Code sections 2090-2096	These code sections comprise article 4 of chapter 1.5 of the California Endangered Species Act. These sections make provisions concerning Department coordination and consultation with state and federal agencies and with project applicants. These sections do not impose substantive requirements. These sections should be included as TBCs.
Wildlife Species	Action must be taken to prohibit the taking of birds and mammals, including taking by poison.	Fish & Game Code section 3005	This code section prohibits the taking of birds and mammals, including taking by poison. "Taking" is defined by Fish and Game Code section 86 to include killing. "Poison" is not defined in the code but contaminants of concern (heavy metals, herbicides and pesticides) are all poisons by definition. Federal law recognizes that poison may effect an incidental taking. (Defenders of Wildlife v. Administrator, Environmental Protection Agency (1989) 882 F.2d 1295.) This code section imposes a substantive, promulgated environmental protection requirement. Bird and mammal fatalities are not impossible under the circumstances at these sites, particularly if stockpiling results in increased concentrations of contaminants. This section should be included as an ARAR.

LOCATION SPECIFIC ARARs AND TBCs for NCAS EL TORO
OU-2B Sites 2, 17 and OU-2C Sites 3, 5

LOCATION	STANDARD	SPECIFIC CUBATION	ARAR/TBC EXPLANATION
Wildlife species/habitats	Action must be taken for the general protection and conservation of fish and wildlife resources.	Fish & Game Code section 1600	This code section declares the protection and conservation of fish and wildlife to be an important public interest. This section is a general statement of policy that does not impose a substantive requirement. This section should be included as a TBC.
Streambed	The Department must propose reasonable modifications to public construction projects that would alter the bed, channel or bank of any river, stream or lake and may substantially adversely affect an existing fish or wildlife resource.	Fish & Game Code section 1601	This section requires notification to and action by the Department. It also imposes a substantive requirement to the extent it requires streambed alteration to not substantially adversely affect an existing fish or wildlife resource. The section is relevant to the extent the operations impact the beds, channel or bank of the Napa River. Section 1601 complements the operation of federal ARAR 40 CFR section 231.1, which authorizes the USEPA Administrator to prohibit activity whenever he determines that the discharge of dredge or fill material may have an "unacceptable adverse affect" on fish and wildlife. Section 1601 also complements the operation of federal ARAR 16 USC section 662, which requires the determination of possible damage to wildlife resources and the means and measures that should be adopted to prevent the loss of or damage to such resources caused by proposed streambed alterations. This section should be included as an ARAR.
Streambed	Any streambed may not be altered without first notifying the Department.	Fish & Game Code section 1603	This section requires notification to and action by the Department. Section 1603 also imposes a substantive requirement to the extent it requires streambed alteration to not substantially adversely affect an existing fish or wildlife resource. This section should be included as an ARAR.

LOCATION SPECIFIC ARARs AND TBCs for MCAS EL TORO
OU-2B Sites 2, 17 and OU-2C Sites 3, 5

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Aquatic and Wildlife species/habitats	Action may be taken to collect damages for the taking of birds, mammals, fishes, reptiles or amphibians.	Fish & Game Code section 2014	This code section declares that it is policy of the state to conserve its natural resources. It allows the state to recover damages in a civil action against any person or local agency which unlawfully or negligently takes or destroys any bird, mammal, fish, reptile or amphibian protected by the laws of the state. This section should be included as an ARAR.
Endangered Species	Action must be taken to conserve endangered species, there can be no releases and/or actions that would have a deleterious effect on species or habitat.	Fish & Game Code section 2080	This section prohibits the taking, importation or sale of any species, or any part thereof, of an endangered species or a threatened species. This section should be included as an ARAR.
Rare native plants	Action must be taken to conserve native plants, there can be no releases and/or actions that would have a deleterious effect on species or habitat.	Fish & Game Code sections 2080 and 1900 <i>et seq.</i>	These code sections make provisions concerning native plant protection, including: criteria for determining endangered plant species; designation of endangered plants by the Fish and Game Commission; research by the Dept.; takings by the Dept. for scientific propagation purposes; other prohibitions on takings; exercise of enforcement authority; arrests and confiscation; carrying out of plant conservation programs by other state departments and agencies; an unauthorized public agency regulations pertaining to agriculture. Sections 1900, 1901, 1904, 1905, 1906, 1907, 1909, 1910, 1911, 1912, and 1913 are procedural and administrative in nature and do not impose any substantive requirements. Section 1908 imposes a substantive requirement for forbidding any "person" to take rare or endangered native plants. If rare or endangered plants are present, then sections 2080 and 1908 should be included as ARARs, and the other sections are TBCs.